No. 75-1880



# In the Supreme Court of the United States

OCTOBER TERM, 1976

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TITLE GUARANTEE COMPANY, ETC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 534 F. 2d 484. The opinion of the district court (Pet. App. 21a-35a) is reported at 407 F. Supp. 498.

### JURISDICTION

The judgment of the court of appeals was entered on April 2, 1976 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on June 28, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

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[1] "Pet. App." refers to the appendix to the petition. "A." refers to the appendix in the court below.

## QUESTION PRESENTED

Whether the pre-trial disclosure of statements of employees and their representatives obtained by the National Labor Relations Board in the investigation of a pending unfair labor practice case would "interfere with enforcement proceedings," so that the statements are exempt from disclosure, under Exemption 7(A) of the Freedom of Information Act.[2]

## STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, as amended, 5 U.S.C. 552, and the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519), 29 U.S.C. 151, *et seq.*, are set out at pp. 43a-47a of the petition.

## STATEMENT

### A. The Unfair Labor Practice Proceeding

On May 28, 1975, District 65, Wholesale, Retail, Office and Processing Union, Distributive Workers of America ("the Union") filed an unfair labor practice charge (A. 10) with the Second Region of the National Labor Relations Board ("the Board"). The charge alleged that the Title Guarantee Co. ("the Company") had violated

[2]The petition also seeks to raise (Pet. 2-3) two additional questions: whether the above-described statements are exempt from disclosure under Exemptions 7(C), 7(D), and 5 of the Act; and whether, if no exemption covers them, the district court may not only require their production, but also enjoin the Board unfair labor practice proceeding until they are produced. In view of its holding that Exemption 7(A) covers these statements, the court of appeals had no occasion to reach these additional questions (Pet. App. 10a, 17a and n. 15). However, should the petition be granted, we reserve the right to argue that the matter sought is also protected by Exemptions 7(C), 7(D), and 5, and that, even if no exemption is applicable, the district court could not properly enjoin the unfair labor practice proceeding.



Section 8(a)(3) and (1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(a)(3) and (1), by refusing to execute a collective bargaining agreement which had been previously agreed upon with the Union. Subsequent amendments to the charge alleged refusal to bargain, in violation of Section 8(a)(5) of the NLRA, 29 U.S.C. 158 (a)(5) (A. 12, 14). On June 30, 1975, the Regional Director, after conducting an investigation, issued a complaint (A. 15-20) alleging that the Company had refused to bargain. The hearing on the complaint was scheduled for September 8, 1975 (A. 19).

By letter of July 2, 1975, the Company, invoking the Freedom of Information Act ("FOIA"), asked the Regional Director that "copies of all written statements, signed or unsigned, contained in the Board's case files * * * be made available for inspection and copying" and that "any such statements taken subsequent to [that] date * * * also be made available" (A. 26-27). The Regional Director denied the Company's request on the ground that the information was privileged from disclosure by Exemptions 5 and 7(A), (C), and (D) of the FOIA, 5 U.S.C. 552(b)(5) and 5 U.S.C. (Supp. IV) (7)(A), (C), and (D) (A. 28-30). The Company filed an appeal with the Board's General Counsel (A. 31-32). On August 1, 1975, the General Counsel denied the appeal for substantially the reasons given by the Regional Director (A. 33-34).

### B. The FOIA Suit

On August 5, 1975, the Company filed this suit in the United States District Court for the Southern District of New York, under the FOIA, 5 U.S.C. (Supp. IV) 552 (a)(4)(B). The complaint alleged that the statements sought were records required to be disclosed under 5 U.S.C. 552(a)(3), that the "failure and refusal to furnish the requested information [was] arbitary and capricious," and that, "[i]f Plaintiff [did] not receive the requested infor-

mation a reasonable time prior to the hearing scheduled for October 14, 1975[3] * * * Plaintiff [would] be wrongfully precluded from properly preparing its defense to the allegations contained in the Board's Complaint and [would] thereby suffer irreparable injury for which no adequate remedy at law exists" (A. 7-8). The Company sought, *inter alia*, a mandatory injunction compelling production of the statements, a preliminary injunction enjoining the Board from holding its hearing pending final adjudication of the FOIA request, and a permanent injunction enjoining the Board from holding its hearing until a reasonable time after it provided the statements (A. 8-9).

The Board moved to dismiss the complaint, or, alternatively, for summary judgment (A. 35-37). The Company filed a cross-motion for summary judgment (A. 38-42). The district court, after hearing argument and making an *in camera* inspection of the material, granted the Company's cross-motion for summary judgment and directed the Board "to turn over the material sought by the plaintiff for inspection and copying forthwith" (A. 76). The court also enjoined the unfair labor practice hearing until the Board complied with the production order (A. 76).

The court of appeals reversed (Pet. App. 1a-20a). The court agreed with the Board that "statements of employees, and their representatives, obtained in connection with unfair labor practice enforcement proceedings are not subject to disclosure as a result of Exemption 7(A)" (Pet. App. 16a). It added, however, that "we do not intend our comments to apply broadly to administrative contexts other than unfair labor practice enforcement proceedings before the NLRB" (*ibid.*). The court of appeals remanded the case to the district court "with instructions to vacate

[3]The hearing had been postponed at the Company's request (A. 21, 22).



its order staying the [Board's] proceedings" (Pet. App. 18a).[4]

## ARGUMENT

The decision of the court of appeals is correct and has been followed by three other courts of appeals which have recently ruled on the same question.[5] Moreover, the decision below is narrow and in terms applies only to Board unfair labor practice proceedings. There is no occasion for review by this Court.

1. The original Exemption 7 to the FOIA protected against disclosure of

> investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

Statements of prospective witnesses obtained by Board agents during their investigation of unfair labor practice charges or objections to a Board conducted election were uniformly held to be covered by the original Exemption 7. *Wellman Industries, Inc.* v. *National Labor Relations Board*, 490 F. 2d 427 (C.A. 4), certiorari denied, 419 U.S. 834. See also *Clement Brothers Co.* v. *National Labor Relations Board*, 282 F. Supp. 540, 542 (N.D. Ga.), approved, *National Labor Relations Board* v. *Clement Brothers Co.*, 407 F. 2d 1027, 1031 (C.A. 5); *Barceloneta Shoe*

[4]The court of appeals, however, subsequently granted the Company's request for a stay of its mandate pending the filing and disposition of a petition for certiorari.

[5]*Goodfriend Western Corp.* v. *Fuchs*, C.A. 1, No. 76-1116, decided May 6, 1976, petition for a writ of certiorari pending, No. 76-51; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*, C.A. 3, No. 76-1228, decided July 8, 1976; *Climax Molybdenum Co.* v. *National Labor Relations Board*, C.A. 10, No. 75-1979, decided July 26, 1976.

*Corp.* v. *Compton*, 271 F. Supp. 591, 593-594 (D. P.R.), cited with approval, *Bristol Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, 939 (C.A. D.C.), certiorari denied, 400 U.S. 824.

These decisions rested on two predicates. First, blanket disclosure of such statements would contravene the basic purposes of the exemption, which were (1) to prevent premature disclosure of the results of the government's investigation, thereby insuring that it could present its strongest case in court, and (2) to protect the government's sources so that persons having information would be willing to volunteer it without fear of reprisal or invasion of their privacy. See *Wellman Industries, Inc.* v. *National Labor Relations Board*, *supra*, 490 F. 2d at 431, and cases there cited.

Second, Congress had committed the matter of discovery to the Board's rule-making power.[6] The Board's rules provide that a pre-trial statement becomes available to a litigant only "after a witness called by the general counsel or by the charging party has testified in a hearing * * *," when such statement may be used "for the purpose of cross-examination." 29 C.F.R. 102.118(b)(1) (1975). This rule rests on the Board's judgment that, because of the fear of reprisal from the employer or the union, employees and others would be reluctant to furnish information to the Board without the assurance that it will not be disclosed unless and until they testify at a formal hearing.[7]

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[6] See, *e.g.*, *National Labor Relations Board* v. *Interboro Contractors, Inc.*, 432 F. 2d 854 (C.A. 2), certiorari denied, 402 U.S. 915; *Electromec Design and Development Co.* v. *National Labor Relations Board*, 409 F. 2d 631 (C.A. 9); *D'Youville Manor* v. *National Labor Relations Board*, 526 F. 2d 3 (C.A. 1).

[7] See *National Labor Relations Board* v. *Lizdale Knitting Mills, Inc.*, 523 F. 2d 978, 980 (C.A. 2); *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 206 (C.A. 7).

Over 94 percent of all unfair labor practice cases closed during fiscal year 1975 were closed prior to hearing (National Labor Relations Board, Fortieth Annual Report 221 (1975)), and many affiants who gave statements in the remaining 6 percent of the cases were never called to testify because their testimony would have been cumulative or irrelevant to the issues ultimately framed in the complaint.



2. In 1974, Exemption 7 was amended, in pertinent part, to cover (5 U.S.C. (Supp. IV) 552(b)(7))—

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings * * *.

Senator Hart, the sponsor of the amendment, stated that the original purpose of Congress in enacting Exemption 7 was "to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have." 120 Cong. Rec. 17033 (1974). He added (*ibid.*):

> Recently, the courts have interpreted the seventh exception to the Freedom of Information Act to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.
>
> That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966. Then, as now, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific inter-

ests, each of which is set forth in the amendment that a number of us are offering.

Specifically, the amendment was aimed at a series of decisions by the Court of Appeals for the District of Columbia Circuit[8] in 1973-1974, which had interpreted Exemption 7 as covering any information contained in an investigatory file originally compiled for law enforcement purposes, regardless of whether future enforcement proceedings were possible in that case, or whether the information was otherwise available to the public.[9]

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[8] *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 502 F. 2d 370 (C.A. D.C.); *Ditlow* v. *Brinegar*, 494 F. 2d 1073 (C.A. D.C.); *Aspin* v. *Department of Defense*, 491 F. 2d 24 (C.A. D.C.); *Weisberg* v. *Department of Justice*, 489 F. 2d 1195 (C.A. D.C.).

[9] This is demonstrated by the following colloquy between Senators Kennedy and Hart:

> Mr. Kennedy. * * * Does the Senator's amendment in effect override the court decisions in the court of appeals on the Weisberg against United States; Aspin against Department of Defense; Ditlow against Brinegar; and National Center against Weinberger?
>
> * * * As I interpret it, the impact and effect of his amendment would be to override those particular decisions. Is that not correct?
>
> Mr. Hart. The Senator from Massachusetts is correct. That is its purpose. That was the purpose of Congress in 1966, we thought, when we enacted this. Until about 9 or 12 months ago, the courts consistently had approached it on a balancing basis, which is exactly what this amendment seeks to do. [120 Cong. Rec. 17039-17040 (1974).]

Senator Hart also stated, at another point:

> This amendment is by no means a radical departure from existing case law under the Freedom of Information Act. Until a year ago the courts looked to the reasons for the seventh exemption before allowing the withholding of documents. That approach is in keeping with the intent of Congress and by this amendment we wish to reinstall it as the basis for access to information. [*Id.* at 17034.]



There is no indication that Congress intended to overrule cases such as *Wellman Industries*, *supra*, holding that witness statements obtained by the Board in an investigation of an on-going case were exempt from disclosure under the original Exemption 7. As shown, these decisions recognized that "[d]iscovery with respect to government witnesses is restricted in recognition of the peculiar character of labor litigation: the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment." *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*, *supra*, n. 5, p. 5 (slip op. 5). Thus Senator Hart explained that the amendment would continue to bar disclosure:

> First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding. [120 Cong. Rec. 17033 (1974).]

This reasoning is equally applicable to enforcement proceedings before the Board.

3. In view of this history, the court of appeals correctly held that "statements of employees, and their representatives, obtained in connection with unfair labor practice enforcement proceedings are not subject to disclosure as a result of Exemption 7(A)" (Pet. App. 16a). Accord: *Goodfriend Western Corp.* v. *Fuchs*, *supra*; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*,

*supra; Climax Molybdenum Co. v. National Labor Relations Board, supra* (see n. 5, p. 5, *supra*). As the court stated, "[w]e cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA" (Pet. App. 15a). "In light of the delicate relationship which exists between employer and employee, we think that Congress would be very reluctant to change the rather carefully arrived at limitations and procedures for discovery in unfair labor practice proceedings by way of an act which, while dealing with disclosure generally, does not purport to affect such discovery" (Pet. App. 16a).[10]

A different conclusion is not required by the 1974 change of the FOIA in 5 U.S.C. (Supp. IV) 552(a)(4)(B), which provides that the district court "may examine the contents of * * * agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions * * * and the burden is on the agency to sustain its action." As the court of appeals stated, an *in camera* inspection is unnecessary with repect to "statements obtained by the NLRB from employees, or their representatives, in connection with unfair labor practice proceedings" (Pet. App. 14a). The very nature of such statements, the court properly concluded (*ibid.*), shows that their pre-hearing release would interfere with enforcement proceedings in two ways. "[F]irst, suspected violators might be able to use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; second, employees who are interviewed

[10]See *Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 ("Discovery for litigation purposes is not an expressly indicated purpose of the Act."); *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143, n. 10 ("The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants.")



may be reluctant, for fear of incurring employer displeasure, to have it known that they have given information [citation omitted], or union officials might not want to volunteer information for fear of compromising the union's position in negotiations * * *" (Pet. App. 13a-14a). These considerations, of course, apply particularly in unfair labor practice proceedings, and the court of appeals limited its holding to such proceedings (Pet. App. 16a).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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